

No. 15498

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

RAYMOND PAE, also known as
KEALOHAKALANI LIU,

Plaintiff-Appellant,

vs.

RUTH LEHUA STEVENS, SAMUEL STEVENS,
also known as BOYD STEVENS, and
KAM TAI LEE, TREASURER OF THE
TERRITORY OF HAWAII,

Defendants-Appellee.

Appeal From the Supreme Court for the
Territory of Hawaii

APPELLEE'S ANSWERING BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from the Supreme Court of the Territory of Hawaii. The proceedings originated in the Circuit Court of the First Judicial Circuit where judgment was rendered in favor of the appellee, which judgment was affirmed on appeal to the Supreme Court of the Territory of Hawaii.

Jurisdiction of this Court derives from 28 U.S.C. 1293, as this is a civil case where the value in controversy exceeds \$5,000, exclusive of interest and costs.

STATEMENT OF THE CASE

The appellee respectfully suggests that the court, in order to be certain of the accuracy of the facts, obtain them from the Stipulation entered into by the appellant and the appellee which appears on pages 25 through 36 of the Transcript of Record.

ARGUMENT

I

THE COURT MAY MODIFY THE JUDGMENT OF THE SUPREME COURT OF HAWAII ONLY IF IT IS MANIFESTLY ERRONEOUS.

The question on appeal is whether the judgment of the Supreme Court of the Territory of Hawaii is manifestly erroneous so as to require this Court to disturb that judgment. This rule, governing appeals of this nature, was set by the Supreme Court of the United States in *Waialua Agricultural Co. v. Christian*, 305 U.S. 91, 59 S. Ct. 21 (1938); rehearing denied, 305 U.S. 673, 59 S. Ct. 240; at page 109:

"It is true that under the appeal statute the lower court had complete power to reverse any ruling of the territorial court on law or fact; but we are of the opinion that this power should be exercised only in cases of manifest error. . . . In so far as the decisions of the Supreme Court of Hawaii are in

conformity with the Constitution and applicable statutes of the United States and are not manifestly erroneous in their statement or application of governing principles, they are to be accepted as stating the law of the Territory. Unless there is clear departure from ordinary legal principles, the preference of a federal court as to the correct rule of general or local law should not be imposed upon Hawaii.”

This rule has been followed by this Court in *Pioneer Mill Co. v. Victoria Ward*, 158 F. 2d 122 (9 Cir. 1946), cert. den., 330 U.S. 838, 67 S. Ct. 979.

There are no issues relating to the Constitution of the United States or to the laws of the United States. The issues are matters solely of local law, more specifically section 12699 of the Revised Laws of Hawaii 1945 (section 5099, Revised Laws of Hawaii 1935 at the time of the commencement of this suit and currently section 342-99, Revised Laws of Hawaii 1955). Section 12699 provides in part as follows:

“Actions for compensation for fraud, mistake, etc.

Any person who, without negligence on his part sustains loss or damage, or is deprived of land or of any estate or interest therein, after the original registration of land under this chapter, by the registration of any other person as owner of such land, or of any estate or interest therein, through fraud, or in consequence of any error, omission, mistake or misdescription in any certificate of title or in any entry of memorandum in the registration book, may bring and prosecute an action of contract in the circuit court for the recovery of compensation for such loss or damage or for such land or estate, or interest therein; *provided*, however, that when the person deprived of land or of any estate, or interest therein, in the manner above stated, has a right of action or other remedy for the recovery of

the land or of the estate, or interest therein, he shall exhaust the right of action or other remedy before resorting to the action of contract herein provided; . . .”

This statute was the legal basis for the cause of action that appellant instituted. It was by measuring the facts to these same provisions that the Supreme Court of the Territory of Hawaii decided that appellant was not entitled to recover compensation for the loss of his interest in parcel 1 from appellee, Kam Tai Lee, treasurer of the Territory of Hawaii. We submit that this judgment is not only not manifestly erroneous but the only proper one that that court could have rendered under the circumstances of both law and fact.

The Hawaii Supreme Court affirmed on two grounds the judgment of the trial court denying appellant recovery: First, that appellant had not exhausted his remedies or rights of action as required by section 12699, and second, that appellant was negligent and thus was, in accordance with section 12699, disqualified from obtaining compensatory relief from the appellee.

II

THE STATUTE GOVERNING APPELLANT'S CAUSE OF ACTION REQUIRED HIM TO FIRST EXHAUST HIS OTHER REMEDIES, AND THE RECORD SHOWS THAT HE DID NOT COMPLY WITH THIS REQUIREMENT.

The cause of action against the treasurer of Hawaii created by section 12699 and pursued by appellant is subject to a proviso:

“ . . . that when the person deprived of land or of any estate, or interest therein, in the manner above stated, has a right of action or other remedy for the recovery of the land or of the estate, or interest therein, he shall exhaust the right of action or other remedy before resorting to the action of contract herein provided; . . . ”

In the face of this express language the Court had no alternative but to require the appellant to first exhaust his other remedies or rights of action before it entertained the statutory action of contract. The language of this proviso is so clear that no construction is necessary; a resort to extrinsic evidence and considerations is entirely out of order in this instance.

It was stipulated between the appellant and the appellee that,

“Plaintiff (appellant) has not brought any action in any court for the purpose of cancelling or rescinding or attempting to cancel or rescind either the deed or Transfer Certificate of Title No. 21247 to Jordan Freitas and Carrie Freitas.” (Page 35 Transcript of Record)

The fact of non-action on the part of appellant having been thus established, the only other pertinent inquiry is whether there were other rights of action or remedies available to appellant.

The opinion of the Hawaii Supreme Court, announcing the judgment which is the subject of this appeal, makes clear that at least one other remedy was available:

“An infant may repudiate a deed, regardless of his negligence, and even under the holding in *Land Title, Bishop Trust, supra*, could recover the land unless the purchasers were bona fide purchasers

without knowledge of the infancy of plaintiff and the fraud perpetrated upon him. There is no showing that he might not have succeeded in repudiating the deed and recovering the land, depending upon the good faith of the purchasers." 41 Haw. 490, at 497-8.

There is nothing in evidence from which the court could have concluded that the purchasers were bona fide purchasers. In this connection it is well to bear in mind that the Freitas' bought a \$14,000 piece of land for \$5,750 or only 41 per cent of the fair market value. Appellant was not entitled to assume that the Freitas' would have raised the bona fide purchaser defense and, much less, that they would have then sustained it.

Other possible remedies for the recovering of land are (1) Before January 20, 1941, a petition to review the transfer certificate of title, on the theory that it is a decree within the meaning of section 12637 (see *Wareham Sav. Bank v. Partridge*, 317 Mass. 83, 56 N.E. 2d 867, 868 (1944); and (2) a bill in equity to set aside the transfer certificate of title, under authority of *Baart v. Martin*, 99 Minn. 197, 108 N.W. 945 (1906).

III

THE STATUTE GOVERNING APPELLANT'S CAUSE OF ACTION REQUIRED THAT HE BE NON-NEGLIGENT IN SUFFERING HIS LOSS, DAMAGE, OR DEPRIVATION, AND THE RECORD AMPLY SUPPORTS THE FINDING OF HIS NEGLIGENCE.

The cause of action instituted by appellant in this litigation is a statutory one and available, by the terms of sec-

tion 12699 which creates this cause of action, only to a "person who, without negligence on his part, sustains loss or damage, or is deprived of land or of any estate or interest therein. . . ."

Appellant contends that the contributory negligence idea in section 12699 does not refer to an infant. Appellant would have the court write into that statute an exception where none exists. Appellant cites *Rathburn v. Kaio*, 23 Haw. 541 (1916) as authority for his proposition that infants are to be excepted from the application of this portion of section 12699, that "person" does not include infants. The Rathburn case merely decided that a breach of contract by a minor was not a tortious act for which his father could be held liable under the terms of section 2993, Revised Laws of Hawaii 1915. Section 12699 of the Revised Laws of Hawaii 1945 (then section 3227, Revised Laws of Hawaii 1915) was not in issue at all. *Jones v. York County, Neb.*, 26 F. 2d 623 (8 Cir. 1928), cited by appellant, is likewise inapposite. The reason the court in the Jones case allowed the infant's cause of action was that the relevant Nebraska statute expressly provided that: "It shall not be an exception to such conclusiveness that the person is an infant, lunatic or is under any disability, but such person may have recourse upon the indemnity fund hereinafter provided for, for any loss he may suffer by reason of being so concluded." (Section 5720, Compiled Statutes of Nebraska, 1922.) There is a conspicuous absence of such a provision in the Hawaii statutes.

The trial court concluded that appellant was a "person" within the meaning of section 12699, and this conclusion

was affirmed on appeal. This is the only interpretation of the word "person", as it appears in said section, rendered by the Supreme Court of Hawaii. Interpretations of local law should be followed by this Court. *McCaw v. Fase*, 216 F. 2d 700 (9 Cir. 1954), cert. den. 348 U.S. 927, 75 S. Ct. 340.

On September 12, 1939 when appellant was practically an adult (i.e., 19 years and seven months old) he and his brother Joseph executed a general power of attorney to Ruth Lehua Stevens [Tr. of R. pp. 26, 30]. Prior thereto he and Joseph had mortgaged Parcel 1 two times; within a month thereafter they had mortgaged it a third time [Tr. of R. pp. 29, 30]. After receiving the power of attorney, Ruth Lehua Stevens did not take long to set up the Freitas sale. Fourteen days after the execution of the power of attorney, Mr. Freitas had made his first payment on account of the proposed purchase of Parcel 1, and on October 11, 1939 the parties detailed the proposed transaction in an escrow agreement. Briefly, Mr. Freitas agreed to buy, if within ninety days the land was registered in the Land Court and then properly transferred to him [Tr. of R. pp. 30, 31]. Within two weeks Ruth Lehua Stevens applied for Land Court registration of Parcel 1. Regardless of whether appellant knew about the escrow agreement, he did know about and consented to Land Court Application No. 1270 [Tr. of R. p. 31]; Land Court registration was then nothing new to appellant for he had on June 17, 1939 executed the Crozier mortgage for the express purpose of securing loans for Land Court costs and expenses [Tr. of R. p. 29]. He made no appearance in court nor checked on court proceedings in

connection with the registration of Parcel 1 [Tr. of R. p. 33].

The law requires that the "legally appointed guardian" apply for Land Court registration on behalf of an infant. (Sec. 12612, Revised Laws of Hawaii 1945.) Ruth Lehua Stevens was not the guardian of appellant. She was represented by G. D. Crozier, Esquire, in Land Court Application No. 1270. If appellant had disclosed his age, Attorney Crozier would have been required to decide whether to proceed under the authority of the power of attorney or to raise a guardian. In this connection, recall also appellant's silence when defendant Samuel Stevens told Attorney C. E. Cassidy that appellant was an adult [Tr. of R. p. 28]).

The law also required that "If the applicant shall have been known by more than one name, he shall state all his names in full." (Sec. 12614, Revised Laws of Hawaii 1945.) The application did not state that appellant had been known as Kealohakalani Lui, had been baptized Raymond Louis, or had been married under the name of Joseph Lui [Tr. of R. pp. 6, 7].

Finally, although having knowledge of Land Court Application No. 1270, appellant made no effort to see if his application had been granted or to check on the exercise of the power of attorney granted Ruth Lehua Stevens until October 8, 1940 [Tr. of R. pp. 34, 35]. It is inescapable that the Freitas' sale would not have taken place if appellant had not been extremely careless.

These facts combine to support the finding of negligence recited by the trial court and then affirmed by the Hawaii Supreme Court.

CONCLUSION

Section 12699 which governs appellant's cause of action makes compensatory relief against the treasurer of the Territory of Hawaii dependent upon the aggrieved, such as the appellant, being non-negligent in the sustaining of his loss or damage and having exhausted his other rights of action and remedies. The Supreme Court of Hawaii in adjudging the appellant not entitled to relief found him deficient in both these requirements. Either one of these two grounds, standing alone, is sufficient to uphold that judgment. We submit that under the legal and factual circumstances the Hawaii Supreme Court was right in affirming the decision of the trial court denying appellant recovery for his loss. That judgment is clearly not "manifestly erroneous" and should be affirmed.

Dated, Honolulu, Hawaii, July 26, 1957.

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